

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-192

BARKER & BRATTON STEEL WORKS, INC.

Petitioner,

versus

**ST. PAUL FIRE AND MARINE INSURANCE COMPANY
TRAVELERS INDEMNITY COMPANY**

and

VANKEL, INC.

Respondents.

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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I

OPINIONS BELOW

Respondents adopt Petitioner's statements.

II

JURISDICTION

Respondents adopt Petitioner's statements.

III

QUESTION PRESENTED

The question presented to this Honorable Court is whether grounds exist in the current action to warrant the granting of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

IV

STATUTE INVOLVED

Respondents adopt Petitioner's statement.

V

STATEMENT OF THE CASE

Respondents adopt Petitioner's statement with the qualification set out below.

Petitioner states that the present case involves novel and complex issues of Alabama bond law. The present case does involve issues of Alabama bond law, which is a complex subject. However, various aspects of the issues involved here have been considered in several cases decided by the Supreme Court of Alabama and in a recent case decided by the United States Court of Appeals for the Fifth Circuit. Therefore, the issues involved here are no more novel than many issues which reach the appellate courts.

VI

REASONS FOR DENYING THE WRIT

Petitioner correctly states that there are two categories of resident defendants in removal cases — insubstantial or fraudulently-joined resident defendants and substantial or properly-joined resident defendants. Petitioner also correctly recognizes that in the first category of resident defendants, removal is proper, and that in the second category, removal is not proper. However, Petitioner unduely complains that the present case and many others involving resident defendants fall into a middle ground between the two categories of resident defendants, and that resident defendants in such cases are forced into one of these two categories at a pre-trial stage of the action by the District Courts.

Any civil action of which the District Courts have jurisdiction based on diversity of citizenship may be removed to the

District Court if none of the defendants in the action are citizens of the state in which the action was brought. 28 U.S.C.A. 1441 (b). A plaintiff cannot deprive a non-resident defendant of his right to remove such an action by improper or fraudulent joinder of a resident defendant. Wilson v. Republic Iron & Steel Company, 257 U.S. 92, 42 S.Ct. 35, 66 L.Ed. 144 (1921). The scheme created by this removal statute and the cases decided thereunder leaves only two possible categories of resident defendants - fraudulently or properly joined. There simply is no other category of resident defendants which has any rational meaning under this removal statute, and thus there is no "middle ground" that can be tolerated under this statute.

When a petition for removal is filed under this statute with an allegation that the resident defendant is fraudulently joined, and there is a motion to remand to the State Court, the District Court is required, at that time, to examine the record and determine if the local defendant is fraudulently or properly joined. This determination must be made when the motion to remand is made because it is at that point that the District Court must determine whether the action will proceed in the District Court or in the State Court. If the petition for removal and the motion to remand are made at some pretrial stage of the action, it is at that time that the District Court must determine the status of the resident defendant; the removal statute does not allow for this determination to be made at any other time.

Although petitioner urges that there is a conflict between the Fifth Circuit and the Eighth Circuit as to how the status of a resident defendant is to be determined, an examination of the cases from each of these circuits and from other courts discloses that no conflict exists.

The Fifth Circuit has clearly said that the status of a resident defendant in a removed action must be determined by examining the case disclosed by the pleadings when the petition for removal was filed. Nunn v. Feltinton, 294 F.2d 450 (5th Cir.

1961). Normally, the only record existing when the petition for removal is filed consists of the State Court pleadings. Only these original State Court pleadings should be considered in determining the status of a resident defendant, and the District Court should not consider amended pleadings filed after the petition for removal has been filed. Bobby Jones Garden Apts., Inc. v. Suleski, 391 F.2d 172 (5th Cir. 1968).

Upon examining these original State Court pleadings, if the District Court finds that no cause of action is asserted against the resident defendant or that there is no basis for the liability asserted against the resident defendant, the joinder of the resident defendant will be regarded as fraudulent and will not be allowed to defeat removal. Parks v. New York Times Co., 308 F.2d 474 (5th Cir.), cert. denied 376 U.S. 949, 84 S.Ct. 964, 11 L.Ed.2d 969 (1962); Nunn v. Feltinton, supra; Covington v. Indemnity Insurance Company of North America, 251 F.2d 930 (5th Cir.), cert. denied 357 U.S. 921, 78 S.Ct. 1362, 2 L.Ed.2d 1565 (1958).

The Eighth Circuit has set out essentially the same guidelines. In determining if removal is proper, the District Court should look to the original complaint filed in State Court. Bolstad v. Central Surety & Insurance Corp., 168 F.2d 927 (8th Cir. 1948); Clancy v. Brown, 71 F.2d 110 (8th Cir. 1934). If the District Court finds that no cause of action is asserted against the resident defendant or that there is no basis for his asserted liability shown in the pleadings, then the joinder is presumed to be fraudulent. Locke v. St. Louis-San Francisco Railway Co., 87 F.2d 418 (8th Cir. 1937); Morris v. E. I. DuPont De Nemours & Co., 68 F.2d 788 (8th Cir. 1934).

Petitioner has cited the Eighth Circuit as having said that the determination of the status of a resident defendant rests in whether the plaintiff really intends to obtain a judgment against the resident defendant. But as the cases from both the Fifth and the Eighth Circuits have implied, the only source from

which the intentions of the plaintiff can be gleaned is the pleadings existing at the time the petition for removal was filed. If these pleadings do not disclose a cause of action against the resident defendant or if no basis for the liability of the resident defendant is shown, the District Court must then assume that the plaintiff either has no claim against the resident defendant or does not intend to recover against him.

Other courts agree with the Fifth and the Eighth Circuits. In Commercial Securities, Inc. v. General Insurance Co. of America, 269 F.Supp. 398 (D.C. Ore. 1966), the Court said that if no cause of action is asserted against a resident defendant, his joinder is a patent sham. In Burt v. Missouri Pacific Railway Co., 294 F.911 (D.C. Ark. 1924) the Court said that if a complaint fails to show a cause of action against resident defendants, non-resident defendants may treat them as being fraudulently joined and may remove the action. The District Courts of Oklahoma have said that joinder is fraudulent if the plaintiff fails to state a cause of action and the lack of a cause of action is obvious. Fine v. Braniff Airways, Inc., 302 F. Supp. 496 (D. C. Okla. 1969); Bohanan v. Atchison, Topeka & Santa Fe Railway Co., 289 F. Supp. 490 (D. C. Okla. 1968).

Both the Fifth Circuit and the Eighth Circuit, and other courts, hold that the District Court must look to the pleadings to determine the propriety of the joinder of resident defendants. If no cause of action is asserted or if no basis of liability is shown against a resident defendant, his joinder may be considered as fraudulent for purposes of removal. Though the words used in each circuit to express the idea may vary, there is no conflict in the basic concept of how to determine the status of the resident defendant in removal cases.

CONCLUSION

There being no conflict between the circuits on this question, no issue is presented to this Honorable Court for review on certiorari, and the Respondents respectfully submit that the Petition for Writ of Certiorari is due to be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of this Brief in Opposition to Petition for Writ of Certiorari have been served on Samuel M. McMillan, attorney for Petitioner, by delivering copies to him at his office at 1202 Commercial Guaranty Bank Building, Mobile, Alabama on the _____ day of September, 1976.

EMMETT R. COX